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MANDATORY ARBITRATION CLAUSES

AND

CONSUMER CLASS PROCEEDINGS

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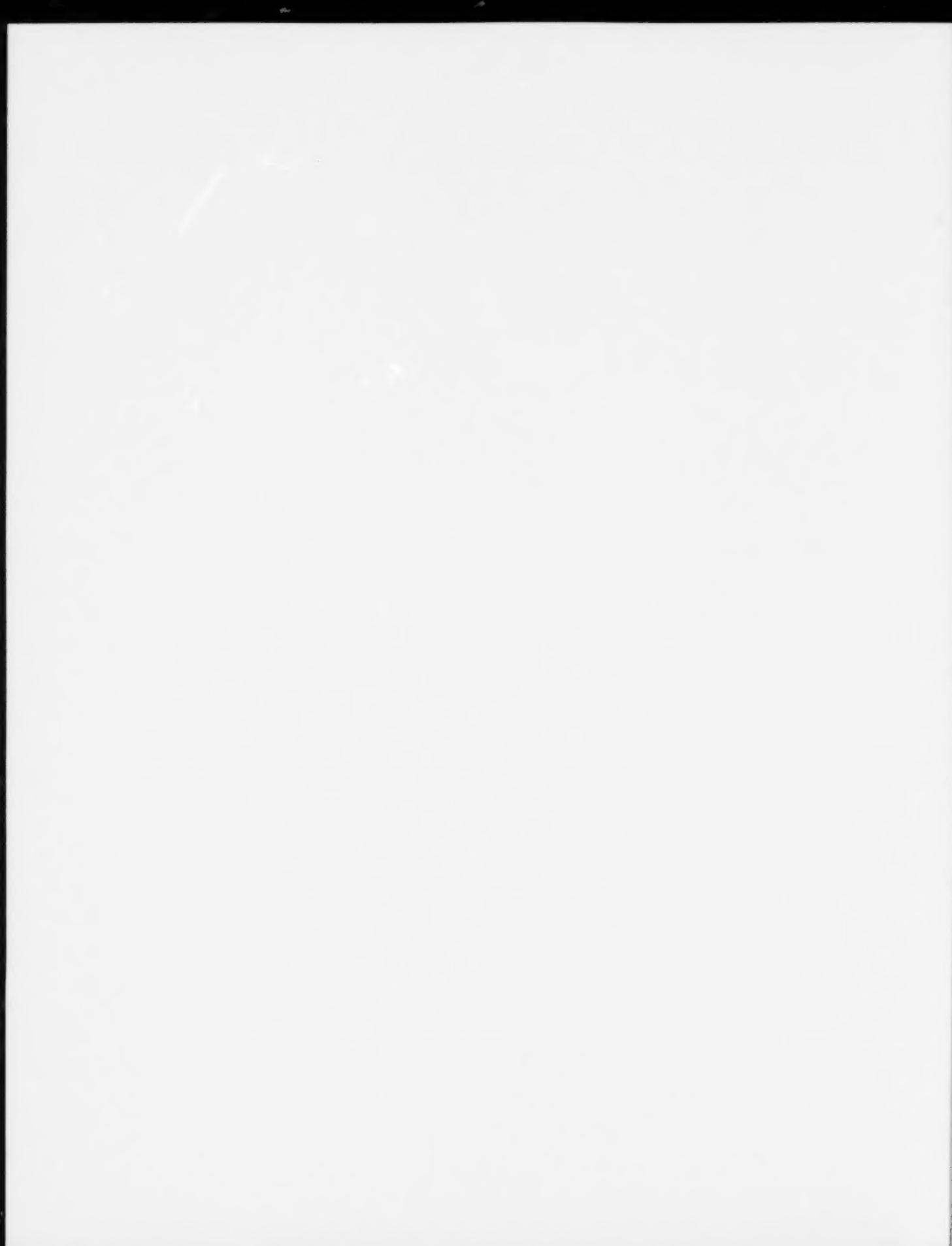


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CHAPTER 1

INTRODUCTION

A. BACKGROUND

The Manitoba Law Reform Commission (the Commission) has historically supported diverse methods of dispute resolution, examples of which include reports on confidentiality of mediation proceedings,¹ class proceedings² and arbitration.³ In the past, the Commission has commented upon the beneficial goals and rationales of these mechanisms.⁴

There can be tension and potential for clash between the goals and rationales of these methods of dispute resolution. A strong clash occurs when mandatory arbitration clauses within consumer contracts purport to bar consumers from commencing actions, including class proceedings. There has been a great deal of uncertainty within Canadian jurisprudence regarding this conflict, and there has been little legislative guidance in most Canadian jurisdictions. There was anticipation that this situation would be resolved by the Supreme Court of Canada in the recently delivered companion decisions of *Dell Computer Corp. v. Union des consommateurs*⁵ and *Rogers Wireless Inc. v. Muroff*.⁶ However, this report will examine some possible unresolved issues regarding the enforceability of mandatory arbitration clauses in the face of proposed consumer class proceedings.

Given the Commission's previous reports and recommendations respecting methods of dispute resolution, it seems appropriate for the Commission to now consider a possible reconciliation of this relatively recent conflict.

B. SCOPE OF REPORT

This report considers the impact of mandatory arbitration upon consumers and businesses in Canada. This report discusses the judicial consideration in Canada of mandatory arbitration clauses and consumer class proceedings, and examines whether the Supreme Court of Canada has resolved this issue. Further, this report reviews the statutory scheme in Manitoba regarding class proceedings, arbitration and consumer protection, and compares it with statutory schemes

¹ Manitoba Law Reform Commission, *Confidentiality of Mediation Proceedings* (Report #94, 1996).

² Manitoba Law Reform Commission, *Class Proceedings* (Report #100, 1999) [*Class Proceedings Report*].

³ Manitoba Law Reform Commission, *Arbitration* (Report #85, 1994) [*Arbitration Report*].

⁴ This report will briefly discuss the attributes of various methods of dispute resolutions, but for a more detailed discussion, refer to the above noted reports.

⁵ *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 [*Dell*].

⁶ *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, 284 D.L.R. (4th) 675 [*Rogers*].

in other jurisdictions. Finally, this report reviews legislative amendments in some Canadian jurisdictions that have invalidated mandatory arbitration clauses in consumer contracts which preclude consumer class proceedings and considers the need for possible statutory amendments to consumer protection legislation in Manitoba.

This report does not seek to comment on mandatory arbitration clauses in areas outside of consumer contracts.⁷

C. ACKNOWLEDGEMENTS

The Commission wishes to thank Professor Phillip Osborne of the University of Manitoba, Faculty of Law, who suggested this subject as a matter for consideration by the Commission.

D. TERMINOLOGY

For the purpose of this report, the term “mandatory arbitration clause” means a pre-dispute clause or provision in a consumer contract that requires two parties (a goods or services provider and a consumer) to arbitrate disputes that arise from the contract.⁸ In this report, the terms “mandatory arbitration clause” and “mandatory arbitration agreement” are used interchangeably and the terms “class proceedings” and “class actions” are used interchangeably.⁹

⁷ In Manitoba, litigation respecting mandatory arbitration predominantly involves disputes arising from collective agreements, which is an area outside the scope of this report.

⁸ This definition was adopted from: Susan Lott, Marie Hélène Beaulieu and Jannick Desforges, Public Interest Advocacy Centre and Options consommateurs, “Mandatory Arbitration and Consumer Contracts” (Ottawa, Canada, November 2004) at 5, online:<http://www.piac.ca/consumer_mandatory>.

⁹ In *Ward v Canada (Attorney General) et. al.*, 2007 MBCA 123, 286 D.L.R. (4th) 684 [Ward], Justice Freedman noted that “class action” is the commonly used term, but used the terms class actions and class proceedings interchangeably.

CHAPTER 2

MANDATORY ARBITRATION CLAUSES IN CANADA

A. THE IMPACT OF MANDATORY ARBITRATION CLAUSES

The disadvantages of mandatory arbitration clauses upon consumers can be severe. It has been noted that consumers are in a vulnerable position when confronted with mandatory arbitration clauses, which generally have not been negotiated and appear as pre-dispute clauses in standard form contracts.¹ The following are examples of how mandatory arbitration clauses and the resultant lack of access to class proceedings may have a negative impact upon consumers:

Usually, the arbitration clause forms part of a standard form contract that has not been the subject of negotiation between the parties. The consumer may not be aware of the arbitration clause until after the dispute arises. Often the dispute involves a modest amount of money that does not warrant hiring a lawyer or processing a claim in Small Claims Court. In this scenario, assuming common complaints, the only realistic hope for a remedy is a consumer class action. Consumers usually have little familiarity with arbitration and may not know how to access the process; as a result, they are unlikely to initiate arbitration. The uncertain cost of arbitration creates an additional barrier to processing a small claim. The private nature of arbitration prevents other consumers from coming forward and pooling resources. Therefore, enforcing a consumer arbitration clause may have the practical result of denying a consumer any meaningful relief and insulating business from consumer actions.²

Not surprisingly, pre-dispute arbitration clauses are being used by the business community as a tactic to blunt the impact of consumer class actions. In defence of this strategy, the traditional arguments advanced against class actions are raised: class actions invite frivolous or insignificant lawsuits that benefit lawyers not the consumer; class actions seek out litigants and create lawsuits that would not otherwise be brought; and the costs of defending class actions are so high that even the blameless defendant is encouraged to settle. Class action legislation was introduced across Canada despite the existence of each of these arguments... Certainly, the class action process is not perfect and abuses may occur. Whatever the imperfections of class actions, they do not justify completely stripping consumers of their only practical recourse.³

¹ Shelley McGill, "The Conflict Between Consumer Class Actions And Contractual Arbitration Clauses" (2006) 43 Can. Bus. L.J. 359.

² *Ibid.* at 359.

³ *Ibid.* at 360.

Barring class actions generally inhibits transparency and accountability concerning harms that may impact large numbers of consumers. Mandatory arbitration clauses allow businesses to potentially insulate unlawful, unfair or deceptive practices from any meaningful review. By preventing resort to the courts via class action proceedings, it is difficult for consumer plaintiffs to obtain information through traditional discovery processes or challenge negative aspects of consumer products or services that may have an impact upon large numbers of consumers. Mandatory arbitration clauses may also have the effect of protecting businesses from negative publicity.⁴

Mandatory consumer arbitration undermines two of the three goals of consumer class proceedings. Economic access to justice is denied if the cost of pursuing a small claim through individual arbitration is excessive and becomes a barrier to pursuing the claim at all; the disproportionate resource base between business and an individual consumer decreases the likelihood and size of consumer success in arbitration; the lack of publicity arising from the private nature of arbitration reduces the number of claims brought forward; and the reduced size and number of individual awards decreases the overall aggregate penalty imposed on a defendant. This minimizes the deterrent effect that modifies defendant behavior. For these reasons class proceedings are more than just a procedural convenience and deserve priority in the consumer environment.⁵

The new arbitration process was adopted to promote the interests of the commercial business community. It proceeded from the assumption that sophisticated disputants with relatively equal bargaining power would collaborate to design their own resolution process. Inherent in this policy was the goal of empowering disputants and giving them more control over dispute resolution while facilitating international trade. The irony is that applying the new policy to the consumer situation has the opposite effect. Consumers have no input into the design of the dispute resolution process and the choice of arbitration is imposed on them by the business party without consultation. The result is that the consumer has no control over dispute resolution.⁶

In any event, the inescapable conclusion is that class proceedings were created with exactly the consumer situation in mind while arbitration was not. It seems only logical that when dealing with consumer disputes, the process that was specifically designed for the consumer situation should have priority over the process that was not.⁷

⁴ Susan Lott, Marie Hélène Beaulieu and Jannick Desforges, Public Interest Advocacy Centre and Options consommateurs, "Mandatory Arbitration and Consumer Contracts" (Ottawa, Canada, November 2004) at 34, online: <<http://www.piac.ca/consumer/mandatory>>.

⁵ McGill, *supra* note 1 at 366-367.

⁶ *Ibid.* at 365.

⁷ *Ibid.* at 366.

The Commission recognizes that there may be innocuous reasons why mandatory arbitration clauses would be desirable to businesses, and that mandatory arbitration may not be utilized or intended as a harmful tactic. To that end, it has been observed that some companies make use of arbitration clauses simply in order to provide a more efficient, cheaper and quicker resolution to disputes than it is believed the court system can provide.⁸

As a point of clarification, it must be emphasized that the focus of this report is on pre-dispute mandatory arbitration clauses. The Commission is not particularly concerned with post-dispute arbitration agreements where consumers voluntarily decide to pursue arbitration as an alternative to traditional litigation.⁹

B. THE POPULARITY OF MANDATORY ARBITRATION CLAUSES

It has been observed that consumer arbitration has arrived in Canada and that "businesses are increasingly inserting arbitration clauses into standard form contracts."¹⁰ It is difficult to ascertain how prevalent mandatory arbitration clauses are in Canada. In a study that examined the use of mandatory arbitration clauses in consumer contracts, it was noted that the use of mandatory arbitration clauses is a recent but likely growing phenomenon.¹¹

By way of comparison, the use of pre-dispute arbitration clauses in standard form consumer contracts, and the resultant litigation, has been contentious in the United States since the 1980s.¹² It has been suggested that the increased use of pre-dispute arbitration clauses in Canada was somewhat predictable given that many Canadian companies are subsidiaries of

⁸ Lott, Beaulieu and Desforges, *supra* note 4 at 9-10.

⁹ In Lott, Beaulieu and Desforges, *supra* note 4 at 54, it was suggested that post-dispute agreements to arbitrate "are the product of meaningful mutual consent... The marginal benefit of information regarding the meaning and consequences of consenting to an arbitration clause is much higher after the dispute has arisen. At that point, it would be reasonable to expect consumers to seek clarification regarding the arbitration agreement, which they are being asked to sign. Having received such clarification, the consumer's consent to the arbitration agreement may be said to be informed and meaningful."

¹⁰ Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006) 51 McGill L.J. 693 at para. 1.

¹¹ Lott, Beaulieu and Desforges, *supra* note 4 at 6, 12-13. This report examined a variety of contracts from Canadian companies involved a wide range of industries, such as telecom, financial services, insurance, energy, on-line shopping, automobile and travel. Of these sample contracts, 11.6% contained arbitration clauses. It was observed that based upon anecdotal evidence, mandatory arbitration clauses are becoming increasingly more common in Canadian consumer contracts. Further, while other types of consumer clauses were outside the scope of the report from the Public Interest Advocacy Centre, just as they are outside the scope of the Commission's report, it was observed by the Public Interest Advocacy Centre that consumer contracts can also contain a variety of other clauses that could negatively impact consumers. Examples of such clauses include provisions which limit the geographical location where proceedings may be commenced, prohibit class proceedings without requiring arbitration and impose confidentiality upon consumers.

¹² Hamilton, *supra* note 10 at para. 3.

American companies that utilize arbitration agreements.¹³ It has also been suggested that the rise of pre-dispute arbitration clauses in the United States was a reaction to the accessibility of civil jury trials, punitive damages and class actions, and that similarly consumer arbitration clauses have been used in response to the growth of class actions in Canada.¹⁴ Further, it has been proposed that pre-dispute arbitration clauses have been used as a “class action risk management strategy” among some corporate entities in Canada.¹⁵

¹³ *Ibid.* at para. 4.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

CHAPTER 3

JUDICIAL CONSIDERATION OF MANDATORY ARBITRATION CLAUSES AND CONSUMER CLASS PROCEEDINGS IN CANADA

A. CANADIAN LOWER COURT CASE LAW

1. Introduction

The case law involving disputes between mandatory arbitration clauses and consumer class proceedings is relatively recent and limited, but its impact upon consumers could be pervasive.

A review of the case law demonstrates that the crux of most of the litigation in this regard involves applications for stays of proceedings of proposed class actions based upon the primacy of valid arbitration agreements. This results in much complication in that provincial class proceedings legislation supports certification of class actions and does not address arbitration, whereas provincial arbitration legislation requires a judge to stay court proceedings if there is a valid arbitration agreement regarding that same dispute, subject to certain exceptions.¹

A review of the case law further demonstrates diverse results and case specific findings by virtue of the application of different legal principles such as contractual interpretation, statutory interpretation, unconscionability or consumer protection.² As well, it has been observed that the case law has not generally dealt with the public policy or the primacy of arbitration and class proceedings in these circumstances,³ resulting in further uncertainty.

All of these factors contributed to the law regarding mandatory arbitration clauses and consumer class proceedings being in a state of flux prior to the Supreme Court of Canada decisions of *Dell Computer Corp. v. Union des consommateurs* and *Rogers Wireless Inc. v. Muroff*.⁴

¹ Shelley McGill, "The Conflict Between Consumer Class Actions and Contractual Arbitration Clauses" (2006) 43 Can. Bus. L.J. 359 at 361 [McGill, "The Conflict"].

² *Ibid.*

³ *Ibid.*

⁴ As will be discussed further in this report, some commentators have criticized *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 [*Dell*] and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, 284 D.L.R. (4th) 675 [*Rogers*], for not providing much clarity to this quandary, and some may even suggest that the law is in no less state of flux following the *Dell* and *Rogers* cases.

2. Decisions Favouring Arbitration Agreements

Some decisions have favoured arbitration legislation over proposed class action proceedings. For example, in *Kanitz v Rogers Cable*,⁵ the plaintiffs commenced class proceedings regarding interruptions in their cable and internet services. The user agreement had been amended to include an arbitration clause and a waiver of any right to commence or participate in any class action. This amendment was inserted subsequent to the original subscription agreement, and was posted on the defendant's website. The court held that the arbitration agreement was not unconscionable or invalid, and gave priority to the *Arbitration Act*,⁶ which required a stay of proceeding in the face of a valid arbitration agreement. Justice Nordheimer applied a sequential approach to the conflict between the class proceeding and arbitration legislation, and stated as follows:

There is no reason to believe that the Legislature intended the interpretation urged by the plaintiffs. *The Class Proceedings Act*, 1992 was passed after the *Arbitration Act*, 1991. If the Legislature had intended that the former was to be given precedence over the latter, it could have so provided. The Legislature could have expressly exempted class proceedings from the effects of the *Arbitration Act*, 1991 as it did with situations of default or summary judgment. It could have enacted any number of other provisions which would have had the same effect. The Legislature chose not to do so.⁷

3. Decisions Not Favouring Arbitration Agreements

Other decisions have rejected mandatory arbitration clauses. For example, in *MacKinnon v National Money Mart*,⁸ the plaintiffs commenced a proposed class proceeding regarding the fees and interest rates in short term payday loans. The standard form loan agreements contained mandatory arbitration clauses which provided for either party to submit a dispute to arbitration. The central disagreement was whether the arbitration clauses were inoperative where the action challenging the contract was brought as a potential class action. In *MacKinnon*, the Court of Appeal was faced with a clash between the *Commercial Arbitration Act*,⁹ which requires a stay of proceeding where pre-conditions for arbitration are met, unless the arbitration agreement is "void, inoperative, or incapable of being performed", and the *Class Proceedings Act*,¹⁰ which requires that the court certify a class proceeding where the legislative requirements are met. The court indicated that the applications for a stay and for certification of the class proceedings

⁵ *Kanitz v Rogers Cable* (2002), 58 O.R. (3d) 299 (S.C.J.) [*Kanitz*].

⁶ *Arbitration Act*, 1991, S.O. 1991, c. 17.

⁷ *Kanitz*, *supra*, note 5 at para. 52.

⁸ *MacKinnon v National Money Mart Co.*, 2004 BCCA 473, 203 B.C.A.C. 103 [*MacKinnon*].

⁹ *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55.

¹⁰ *Class Proceedings Act*, R.S.B.C. 1996, c.50. Section 4(1)(d) sets out that one of the requirements for certification is whether "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues".

should proceed together and that the outcomes are interdependent. It was decided that an arbitration agreement can be found “inoperative” only after class proceedings are certified, and that a “the decision whether to grant a stay of an intended class proceeding should not be made before the court determined whether the action will be certified as a class proceedings.”¹¹ The sequential approach that was applied by Justice Nordheimer in *Kanitz* was rejected, and it was held in *MacKinnon* that the court must determine, on a case by case basis, whether arbitration or class proceedings would be the preferable procedure.

The approach taken in *MacKinnon* was followed by the Ontario Court of Appeal in *Smith v National Money Mart Co.*,¹² which also involved a proposed class action regarding allegedly unlawful interest rates charged on payday loans. The payday loan agreements in question contained arbitration clauses requiring that disputes be mediated or arbitrated. It was held that the legality of the arbitration clause should be determined at a certification hearing.¹³

B. SUPREME COURT OF CANADA CASE LAW

1. Introduction

On July 13, 2007, the Supreme Court of Canada released the companion decisions of *Dell* and *Rogers*. In both of these cases, the key issue in dispute related to the validity of mandatory arbitration clauses within consumer contracts. In both cases, the Supreme Court of Canada held that the subject contractual arbitration clauses were valid and enforceable and that the consumer plaintiffs were precluded from commencing class proceedings.

Prior to the release of *Dell* and *Rogers*, there had been eagerness and anticipation among some commentators that the Supreme Court of Canada would resolve the conflict respecting the enforceability of mandatory arbitration clauses in consumer contracts, and provide uniformity and consistency on a national basis.¹⁴ This anticipation seems to have been replaced by

¹¹ *MacKinnon*, *supra* note 8 at para. 57.

¹² *Smith v National Money Mart Co.* (2005), 258 D.L.R. (4th) 453 (Ont.C.A.) [*Smith*].

¹³ *Ibid.* at para.14. It is interesting to note that sections 7 and 8 of the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, which provide that mandatory arbitration clauses are invalid, were enacted a few months prior to the *Smith* decision. In *Smith*, the court suggested that the Superior Court judge would want to take sections 7 and 8 of the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, into account at the certification hearing. By way of judicial history, the certification hearing took place over one year later before Justice Hoy in *Smith v. National Money Mart Co.* (2007), 37 C.P.C. (6th) 171 (Ont. S.C.J.) There, Justice Hoy made reference to the suggestions provided by the Ontario Court of Appeal, but ultimately, Money Mart did not rely on the arbitration clauses. Rather, Money Mart referred to “its willingness to mediate or arbitrate.” Accordingly, a decision was not necessary as to whether the arbitration clauses in the consumer agreements were enforceable, and it was held that class proceedings were preferable to arbitration (or mediation). See paras. 129-132. Leave to appeal was dismissed in *Smith v. National Money Mart Co.* (2007), 30 E.T.R. (3d) 163 (Ont. S.C.J.).

¹⁴ McGill, “The Conflict”, *supra* note 1 at 361-363.

disappointment at a lack of consumer protection,¹⁵ by frustration at the apparent conflict between *Dell* and *Rogers* and existing case law¹⁶ and dissatisfaction with the abdication of "consumer protection responsibility to the legislature".¹⁷

2. The *Dell* Case

(a) Facts

In *Dell*, erroneous sale prices for two models of handheld computers were posted on the order pages of the Dell Computer Corporation's English-language website (Dell Company). The correct prices were posted on all other website pages. The error resulted in a significant price reduction. When the Dell Company discovered the mistake, it blocked access to the erroneous order pages. The plaintiff, and 354 other Quebec consumers, circumvented the block by using a deep link to access the order page, and orders were placed for 509 computers at the reduced price. The Dell Company posted a price correction notice and announced that it would not process orders that were placed at the erroneous price. When the Dell Company refused to process the orders at the reduced price, the plaintiff filed a motion for authorization to commence a class action against the Dell Company seeking to have the reduced price honoured. The Dell Company argued that the dispute should be referred to arbitration pursuant to an arbitration clause found in the terms of conditions of sale. The Supreme Court of Canada held that the claim should be referred to arbitration and that the motion for certification to commence class proceedings should be dismissed.¹⁸

In *Dell*, the Supreme Court of Canada dealt with myriad issues including arbitration, class actions, statutory interpretation, international law, e-commerce, Quebec private law, *The Civil Code of Quebec*¹⁹ and *The Code of Civil Procedure*.²⁰ For the purposes of this report, there are two aspects of the *Dell* decision that are most relevant, namely, (1) a court's jurisdiction to determine the validity of a consumer arbitration clause and (2) the validity of a mandatory arbitration clause in the face of a proposed consumer class action.

¹⁵ Jacob Ziegel, "Canada's Top Court Has Sold Out Consumers By Handing Businesses An Easy Way To Avoid Class Action Suits", *Financial Post* (9 August 2007), online: <<http://www.financialpost.com/story.html?id=81511a9c-8c02-4f3b-a0c2-0651b10e3d96>>.

¹⁶ Shelley McGill, "Consumer Arbitration and Class Actions: The Impact of *Dell Computer Corp v Union Des Consommateurs*" (2007) 45 Can. Bus. L.J. 334 at 335 [McGill, "The Impact"].

¹⁷ *Ibid.* at 334.

¹⁸ *Dell*, *supra*, note 4 at paras. 4, 5 & 121.

¹⁹ *Civil Code of Quebec*, S.Q. 1991, c. 64 [C.C.Q].

²⁰ *Code of Civil Procedure*, R.S.Q. c. C-25 [C.C.P].

(b) The Jurisdiction of the Court

The court held that arbitrators have the jurisdiction to rule on their own jurisdiction, and that any challenges to their jurisdiction arising from an arbitration clause must first be referred to the arbitrator. Madam Justice Deschamps stated as follows:

First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systemic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.²¹

If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.²²

Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might still decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.²³

²¹ *Dell*, *supra* note 4 at para. 84.

²² *Ibid.* at para. 85.

²³ *Ibid.* at para. 86.

(c) Class Proceedings

The court did not delve into the issue of class actions in much detail.²⁴ It was held that the consumers were bound by the arbitration clauses and could not proceed with class proceedings. In a finding that is unique to Quebec, the court stated that class proceedings are procedural in nature (rather than being a substantive right) and therefore fall outside the scope of the Quebec definition of “public order”.²⁵ This distinction is significant only in Quebec where the C.C.Q. excludes, *inter alia*, matters of “public order” from arbitration.²⁶

(d) Statutory Amendment

Finally, the issue of a transitional provision was addressed in *Dell*. A day after *Dell* was heard by the Supreme Court of Canada, but prior to the release of the *Dell* decision, a bill was enacted which amended the Quebec *Consumer Protection Act*.²⁷ Specifically, this amendment added section 11.1 to the consumer protection legislation, and prohibits any stipulation requiring a consumer dispute to be referred to arbitration, particularly if it denies a consumer access to class actions. Based upon principles of statutory interpretation, the court held that *Bill 48*²⁸ was a substantive change of law and did not apply retroactively. The court determined that the dispute was not an ongoing legal situation and because the facts giving rise to the dispute had occurred in their entirety prior to this legislative amendment, the new legislation did not apply.²⁹

²⁴ In McGill, “The Impact”, *supra* note 16 at 345-346, it was noted that even the dissent (who would have refused to enforce the arbitration agreement for reasons based upon articles in the C.C.Q.) agreed with the primacy of arbitration and did not find class action policy goals to be relevant in determining the validity of the arbitration clauses. It is arguable that the court’s strong preference for the primacy of arbitration is revealed by the absence of any comprehensive analysis of class actions.

²⁵ *Ibid.* at 345-346.

²⁶ *Ibid.*

²⁷ *Consumer Protection Act*, R.S.Q. c. P-40.1. [Consumer Protection Act]. Also see *Bill 48, An Act to amend the Consumer Protection Act*, 2nd Sess., 37th Leg., 2006 [Bill 48]. A more detailed discussion of this provision will be discussed further in this report.

²⁸ *Bill 48, supra* note 27.

²⁹ *Dell, supra* note 4 at paras. 111-120.

3. The *Rogers* Case

(a) Facts

In *Rogers*, the plaintiff commenced class action proceedings on behalf of himself and all other Canadian subscribers who had been charged increased roaming charges in certain excluded areas in the United States. The service agreement, which appeared on the bills sent to the plaintiff and on Rogers' website, contained an arbitration clause referring all disputes to arbitration, and expressly barring customers from commencing or participating in class actions. The plaintiff submitted that the arbitration clause was abusive. The key issue in dispute was the validity of an arbitration clause within a consumer contract that prohibited access to class action procedures.

(b) The Decision

The court commented that the challenge regarding the validity of the arbitration clause would require a "detailed factual inquiry on a mixed question of law and fact".³⁰ The court referred to *Dell* and reiterated their findings, namely: that arbitrators have the jurisdiction to rule on their own jurisdiction, that challenges to the jurisdiction of an arbitrator arising from an arbitration clause must first be referred to the arbitrator (unless the challenge to the arbitrator's jurisdiction involves a question of law alone), that an arbitration clause is not abusive merely because it is found in a consumer contract and that *Bill 48*³¹ could not be applied retroactively and did not apply to the case at bar.³² Similar to the outcome in *Dell*, it was held that the dispute should proceed to arbitration pursuant to the arbitration clause, and that the proposed class proceedings should be dismissed.

³⁰ *Rogers*, *supra* note 4 at para. 20.

³¹ *Bill 48*, *supra* note 27.

³² *Rogers*, *supra* note 4 at paras. 11-19.

C. REACTIONS TO *DELL AND ROGERS*

Outside of Quebec, the judicial consideration and impact of *Dell and Rogers* have been limited.³³ Some commentators are concerned that *Dell and Rogers* will have a crushing impact on consumer justice in Canada,³⁴ and yet others do not believe that *Dell and Rogers* will undermine class actions.³⁵

In this regard, the following concerns have been made regarding consumer class actions in the context of contractual cases:

...Consumer activists have roundly criticized the Supreme Court decisions as jeopardizing the future of class actions in Canada, at least in contractual cases... The critics are basically right. Though the relevant arbitration and class actions provisions differ across Canada, the Supreme Court judgments will generally have a debilitating effect. Ontario and Quebec are exceptions because these provinces have now outlawed mandatory-arbitration provisions in consumer contracts.³⁶

The majority and minority judgments in *Dell* are long (a daunting 114 pages altogether) and complex, but both suffer from similar defects. They fail largely to recognize the fundamental difference between the redress of consumer and business grievances. They fail too to appreciate the overarching purpose of consumer class actions to permit the aggregation of large numbers of individual claims where it would be prohibitively expensive and unrealistic to expect aggrieved consumers to pursue individual claims.³⁷

³³ To date, *Dell*, *supra* note 4, has been judicially considered in 19 reported decisions, only 6 of which are from courts outside of Quebec. Of these 6 common law cases, the decision of *Frey v Bell Mobility Inc.* 2008 SKQB 79 [*Frey*] is the only case that involves a consumer contractual claim. The remaining 5 common law cases considered *Dell* in the context of administrative law decisions regarding the general rule of referral and in a franchise dispute involving an exclusive jurisdiction clause (see *Wheeler v Hwang* 2007 NLTD 145, 270 Nfld. & P.E.I.R. 271, *Bearlap Inc. v Jaffe* (2007), 161 A.C.W.S. (3d) 898 (Ont. S.C.J.), *Sumitomo Canada Ltd. v Saga Forest Carriers (Intl.) AS* 2007 BCPC 373, *EDF (Services) Ltd. v. Appleton & Associates* (2007), 159 A.C.W.S. (3d) 781(Ont. S.C.J.) and 2038724 Ontario Ltd. v Quizno's Canada Restaurant Corp. [2008] O.J. No. 833 (Ont. S.C.J.)). In *Frey*, the court had certified a consumer class action notwithstanding an arbitration clause, and determined that the class action procedure should have preference over the arbitration procedure. Subsequently, the defendants filed an application seeking a stay of proceeding of the class action on the basis that *Dell and Rogers* were a new development in the law, and that the plaintiffs were accordingly bound by the mandatory arbitration clause. At paragraphs 11-12, the court cited *Dell and Rogers* and stated "They are authority for the proposition that a binding arbitration clause removes a dispute from the jurisdiction of a superior court and of necessity precludes participation in a class action. In addition, the validity of the arbitration clause must be referred to an arbitrator in first instance. I am bound by the cited decisions. Consequently, my decision that the class action prevails cannot stand."

³⁴ Ziegel, *supra* note 15.

³⁵ Paul Michell, "Class actions aren't dead yet" *Financial Post* (9 August 2007), online: <<http://www.financialpost.com/story.html?id=d7ec6566-7b16-4cdb-b80f-23ca41d8b45a&p=2>>.

³⁶ Ziegel, *supra* note 15.

³⁷ *Ibid.*

Of course, the object of an arbitration clause may be to avoid class claims altogether and to be able to pick off those plaintiffs, one at a time, that have the deep pockets and the perseverance to pursue individual claims. It is precisely this mischief that class action legislation was designed to reverse and that regrettably the members of the Supreme Court failed firmly to keep in mind in addressing the technical issues before them.³⁸

As an alternative perspective, the following observations have been made:

Class-proceedings legislation certainly serves important public goals. But so does arbitration legislation, and there is nothing magic about the former that necessarily means it should trump the latter. In attempting to reconcile the two procedures, the court rightly decided that arbitration should prevail, at least where the parties appear to have entered into a valid arbitration clause. Disputes about the validity of the clause should in most cases be initially resolved by arbitrators. Applicable consumer-protection legislation will override this balance, and it is open to the provinces to determine their own mixture of procedures and remedies. There is no reason to believe that class proceedings will not continue to provide access to justice in appropriate cases, or that consumers will be left out in the cold. Class actions are not dead yet.³⁹

It has also been suggested that *Dell and Rogers* may have a narrow impact, and that "it is possible to rely upon the peculiarities of the Quebec arbitration legislation to limit its applicability."⁴⁰ To that end, it has been observed that there are many distinguishing features of *Dell and Rogers* which may limit their impact to Quebec, namely: (1) that the issues are related to the Quebec civil justice system, (2) that the decisions focus on the structure and interpretation of the C.C.Q. rather than the goals and policies of arbitration and class actions, (3) the uniqueness of Quebec consumer protection, arbitration and class action legislation and (4) the lack of a preferability requirement in the Quebec certification process as compared with other Canadian jurisdictions.⁴¹ Even if this same conflict were to arise again in Quebec, the impact of *Dell and Rogers* may be limited having regard to section 11.1 of the *Consumer Protection Act*.⁴²

³⁸ *Ibid.*

³⁹ Michell, *supra* note 35.

⁴⁰ Craig A.B. Ferris, "Understanding Arbitration Clauses in Class Actions: Have the Sands Shifted Once Again?" (Paper presented to the Canadian Institute National Forum on Class Actions Litigation, Toronto, 21 September 2007)[unpublished] at 17-18, online:<<http://www.lawsonlundell.com/resources/UnderstandingArbitrationClauses.pdf>>.

⁴¹ McGill, "The Impact", *supra* note 16 at 350-351. This article also notes that *Dell and Rogers* did not consider or mention the preferability approach adopted in *MacKinnon and Smith*, and suggests that if the Supreme Court of Canada had intended to overrule the reasoning used in two courts of appeal, it would have said so directly, and perhaps the process from *MacKinnon and Smith* is intact in common law provinces.

⁴² *Consumer Protection Act*, *supra* note 27.

Notwithstanding all of these reasons why *Dell* and *Rogers* could be narrowly construed, and notwithstanding the suggestion that *Dell* and *Rogers* may not undermine class actions, their impact on Canadian common law jurisdictions is most uncertain. There is a strong predilection from the Supreme Court of Canada towards arbitration, which may have an influence on other Canadian jurisdictions.⁴³ To that end, the Commission takes the position that *Frey* exemplifies the vulnerability of consumer class proceedings and demonstrates the need for legislation prohibiting mandatory arbitration clauses in order to preserve consumer class proceedings.

⁴³ McGill, "The Impact", *supra* note 16 at 351. This article observed that in *Rogers* (at para. 15) and *Dell* (see paras. 227 and 229) the court commented that arbitration clauses are not abusive merely because they are found in consumer contracts or contracts of adhesion, and it is possible for the adhering party to still provide true consent. It has been suggested that this holding may be "used by judges and arbitrators when assessing the validity, unconscionability and the inherent unfairness of consumer arbitration clauses." This could have ramifications well beyond Quebec. See McGill, "The Impact", *supra* note 16 at 347-348.

CHAPTER 4

CLASS PROCEEDINGS IN MANITOBA

A. CLASS PROCEEDINGS LEGISLATION

*The Class Proceedings Act*¹ is relatively recent legislation governing class proceedings in Manitoba. It is a comprehensive statute that prescribes the manner by which proceedings are certified as class proceedings, sets out extensive procedural matters and describes the orders and awards that can be issued by the court. *The Class Proceedings Act*² does not contain any provisions pertaining to arbitration. The relevant sections provide as follows:

- 2(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of that class.
- 2(2) A person who commences a proceeding under subsection (1) must make a motion to the court for an order
 - (a) certifying the proceeding as a class proceedings; and
 - (b) appointing a representative plaintiff.
3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to the court for an order certifying some or all of the proceedings as a class proceeding and appointing a representative plaintiff.
4. The court must certify a proceeding as a class proceeding on a motion under section 2 or 3 if:
 - (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of two or more persons;
 - (c) the claims of the class members raise a common issue, whether or not the common issue predominates over issues affecting only individual members;
 - (d) **a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;** (emphasis added) and
 - (e) there is a person who is prepared to act as the representative plaintiff who
 - i. would fairly and adequately represent the interests of the class,
 - ii. has produced a plan for the class proceeding that sets out a workable method of advancing the class proceeding on behalf of the class and of notifying class members of the class proceeding, and
 - iii. does not have, on the common issues, an interest that conflicts with the interests of other class members.

¹ *The Class Proceedings Act*, C.C.S.M. c. C130. This Act came into force on January 1, 2003.

² *Ibid.*

It is significant to note that the scope of section 4 is broad and that the statutory scheme is meant to facilitate class actions. In that regard, the Manitoba Court of Appeal commented upon the purpose of *The Class Proceedings Act*³ in the case of *Ward v Canada (Attorney General) et al.*⁴ wherein Justice Freedman observed that this is attractive legislation from a plaintiff's perspective, and commented as follows:

...Manitoba is considered a "plaintiff-friendly" class action jurisdiction.⁵

The *Act* represents, of course, the expressed will of the Legislature, which has quite deliberately crafted this legislation in a fashion designed to encourage and facilitate class actions in this province, provided, of course, that there is a solid jurisdictional basis for such actions to be brought here.⁶

B. PUBLIC POLICY AND BENEFITS OF CLASS PROCEEDINGS

In 1999, the Commission issued the *Class Proceedings Report*.⁷ At that time, the Commission noted that class actions in Manitoba were governed by the rules pertaining to multi-party proceedings in *The Court of Queen's Bench Rules*,⁸ and this was criticized by the Commission as a "patchwork of provisions intended to deal with specific problems, and not an adequate substitute for a comprehensive class proceeding regime."⁹ Ultimately, the Commission recommended that Manitoba should adopt a statutory class proceedings regime.¹⁰

In the *Class Proceedings Report*, it was observed that the three main rationales for the use of class proceedings are "improved access to justice for plaintiffs, more efficient use of judicial resources, and providing a mechanism for accountability".¹¹ The Commission expanded upon the goals of class proceedings as follows:

³ *Ibid.*

⁴ *Ward v Canada (Attorney General) et al.*, 2007 MBCA 123, 286 D.L.R. (4th) 684 [*Ward*].

⁵ *Ibid.* at para. 9.

⁶ *Ibid.* at para. 58.

⁷ Manitoba Law Reform Commission, *Class Proceedings* (Report #100, 1999) [*Class Proceedings Report*].

⁸ *The Court of Queen's Bench Rules*, Man.Reg. 553/88 [QB Rules]. Currently, QB Rule 12 is the only rule that specifically pertains to class proceedings and provides that class proceedings shall be conducted in accordance with *The Class Proceedings Act*, *supra* note 1, and specifies that documents filed in connection with class proceedings require a specific heading.

⁹ *Class Proceedings Report*, *supra* note 7 at 13.

¹⁰ The recommendations made in this report were implemented by the enactment of *The Class Proceedings Act*, C.C.S.M. c. C130.

¹¹ *Class Proceedings Report*, *supra* note 7 at 22.

...These goals were described in *Hollick v Toronto (Metropolitan)*¹² as follows:
It is well established that *The Class Proceedings Act* has 3 main goals:

- (i) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;
- (ii) improved access to the courts for those whose actions might not otherwise be asserted. This involved claims which might have merit but legal costs of proceeding were disproportionate to the amount of each claim and hence many plaintiffs would be unable to pursue their legal remedies;
- (iii) modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations.¹³

The *Class Proceedings Report* provided numerous examples of class actions, including contractual class actions involving consumer claims such as defective products, misrepresentations, wage and wrongful dismissal claims, and franchise agreement disputes.¹⁴ The *Class Proceedings Report* did not specifically address mandatory arbitration clauses in consumer contracts that prohibit consumer class proceedings. However, this report did give consideration to class proceedings involving consumer protection claims and commented that consumer protection claims "require recourse to a procedure that can fairly balance the claims of large numbers of plaintiffs against the procedural entitlement of defendants".¹⁵ To that end, the following observations were made:

Not the least important rationale behind the introduction of class proceedings legislation is the need to provide a means of redress to people whose injuries are insufficient, except in the aggregate, to make pursuing compensation in the judicial system economically feasible. As well, the judicial system is being called upon to do more and more with fewer and fewer resources, and class proceedings can help ensure that those resources are used as efficiently as possible. Class proceedings legislation will also hold wrongdoers

¹² *Hollick v Toronto (Metropolitan)* (1998), 63 O.T.C. 163 (Gen. Div.) at para. 19.

¹³ *Class Proceedings Report*, *supra* note 7 at 22.

¹⁴ *Ibid.* at 18. The Commission is currently in the process of finalizing a report on franchise law, [*Franchise Law Report*]. A consultation paper on franchise law was issued in May 2007, and is accessible on the Commission's website at: <<http://www.gov.mb.ca/justice/mlrc/projects.html>>. In the *Franchise Law Report*, the Commission considers the availability of class proceedings in cases of franchise disputes. Specifically, the Commission notes that a franchise agreement may contain provisions requiring that any dispute between the franchisee and franchisor must be resolved by arbitration, and generally prohibit the franchisee from commencing a court action, whether individually or by way of class proceedings. In such cases, the franchisee, like a consumer, is not free to negotiate such a term, and is put in a "take it or leave it" situation. In the *Franchise Law Report*, the Commission is persuaded that franchise legislation should protect the availability of class proceedings. The *Franchise Law Report* will recommend that franchise legislation in Manitoba should provide that a mandatory arbitration clause in a franchise agreement is invalid insofar as it prevents a franchisee from participating in a class proceeding, and that a franchisee may commence or become a member of a class proceeding in respect of a franchise dispute notwithstanding any provision in an agreement that purports to preclude class proceedings. Of course, a franchisee would still be required to obtain court certification of a prospective class proceeding.

¹⁵ *Ibid.* at 35.

accountable for wrongs that might not be pursued by individual victims, thereby enhancing the fairness of society as a whole.¹⁶

The Commission reiterates these comments for the purpose of this report herein.

¹⁶ *Ibid.*

CHAPTER 5

ARBITRATION IN MANITOBA

A. ARBITRATION LEGISLATION

In Manitoba, *The Arbitration Act*¹ governs arbitrations conducted under an arbitration agreement or authorized under an enactment. Pursuant to section 1(1) of *The Arbitration Act*,² an arbitration agreement is defined as “an agreement or part of an agreement by which two or more persons agree to submit a matter in dispute to arbitration”.

The statutory scheme of this legislation limits judicial intervention and encourages stays of proceedings in the face of valid arbitration agreements, subject to limited exceptions. The relevant sections pertaining to judicial intervention and stays of proceedings provide as follows:

- 6 No court may intervene in matters governed by this Act, except for the following purposes, as provided by this Act:
 - (a) to assist the arbitration process;
 - (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
 - (c) to prevent unfair or unequal treatment of a party to an arbitration agreement;
 - (d) to enforce awards.
- 7(1) Subject to subsection (2), if a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.
- 7(2) The court may refuse to stay the proceeding in only the following cases:
 - (a) a party entered into the agreement while under a legal incapacity;
 - (b) the arbitration is invalid;
 - (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Manitoba law;
 - (d) the motion was brought with undue delay;
 - (e) the matter in dispute is a proper one for default or summary judgment.

*The Arbitration Act*³ does not contain any provisions pertaining to mandatory arbitration clauses or class proceedings.

¹ *The Arbitration Act*, C.C.S.M. c. A120.

² *Ibid.* Section 2(1) provides that this Act applies to an arbitration conducted under an arbitration agreement or authorized or required under an enactment unless (a) the application of this Act is excluded by law; or (b) Part II of *The International Commercial Arbitration Act*, C.C.S.M. c. C151 applies to the arbitration. Further, section 2(2) provides that if there is a conflict between this Act and another enactment that authorizes or requires an arbitration, the other enactment prevails.

³ *Ibid.*

B. PUBLIC POLICY AND BENEFITS OF ARBITRATION

The public policy and benefits of arbitration were previously considered by the Commission in the *Arbitration Report*.⁴ In the *Arbitration Report*, the Commission defined arbitration as a “dispute resolution mechanism whereby two or more parties **voluntarily** agree to submit their dispute, not to the courts, but to a private impartial individual or panel of individuals whose decisions is agreed to be binding on them.”⁵ (emphasis added). The Commission observed that arbitration is an alternative dispute resolution which offers a number of advantages to participants, namely:

1. Arbitration is usually more cost effective for disputing parties than litigation, largely by virtue of reduced pre-trial procedures and the resultant legal fees.
2. Arbitration is more cost effective for taxpayers in that the judicial system is not generally invoked.
3. Arbitration is generally a faster process than litigation, and does not require complex pre-trial procedures.
4. Arbitration is informal, accessible and flexible.
5. Arbitration allows for privacy and confidentiality, subject to a decision being appealed to court.
6. Arbitration permits the selection of a decision-maker who may have particular expertise in the disputed area.⁶

In the *Arbitration Report*, the Commission recommended that “Manitobans should have full access to the advantages of arbitration”,⁷ and that “[s]uch access becomes all the more important in a time of cost-consciousness for individuals, business and the public purse alike.”⁸

Despite these advantages, the Commission emphasizes that a distinction must be drawn between arbitration as a voluntary dispute resolution mechanism, and mandatory arbitration clauses that are not individually negotiated and are imposed upon consumers. The Commission takes the position that some of the above noted benefits (such as accessibility and cost effectiveness) are not achievable if consumers are involuntarily bound by mandatory arbitration pursuant to contractual provisions. This is particularly the case where litigation arises regarding the validity of mandatory arbitration clauses in the face of proposed class proceedings.

In a report on arbitration prepared by the Law Reform Commission of British Columbia, the following concerns regarding contracts of adhesion were expressed, which concerns are relevant in the context of this report herein:

⁴ Manitoba Law Reform Commission, *Arbitration* (Report #85, 1994) [*Arbitration Report*]. The recommendations made in this report were implemented by the enactment of *The Arbitration Act*, C.C.S.M. c. A120.

⁵ *Ibid.* at 1.

⁶ *Ibid.* at 1-2.

⁷ *Ibid.* at 5.

⁸ *Ibid.* at 5.

The disadvantages of arbitration raise particular concerns in relation to contracts of adhesion.⁹ A "contract of adhesion" is one imposed by one party (the dominant party) on another party (the adherent party) through a standard form prepared and used by the dominant party in the course of his business. It might be used where the dominant party has a monopoly over the services or goods which the other party requires, or because an industry as a whole utilizes similar contracts.

As such contracts are not in practice freely negotiated, the adherent party does not have a free choice to settle disputes by arbitration. When an arbitration clause is used in a contract of adhesion, it is in the interest of the dominant party that any dispute be settled by arbitration. This interest may not coincide with that of the adherent party.⁹

⁹ The British Columbia Law Institute, *Arbitration* (Report #55, 1982) at 4.

CHAPTER 6

CONSUMER PROTECTION LEGISLATION

A. MANITOBA

1. Introduction

In Manitoba, there are a large number of statutes that contain consumer protection elements.¹ Although most of this legislation is not relevant to this report, it is reasonable to conclude that the wide breadth of consumer protection related legislation is demonstrable of the significance and importance placed upon consumer protection within Manitoba. The two relevant consumer protection statutes are discussed below.

2. *The Consumer Protection Act*²

*The Consumer Protection Act*³ regulates a broad range of consumer matters such as credit agreements and leases, vendors and direct sellers, collection practices, prepaid services, internet agreements and the licensing of payday lenders. There are a number of investigative and remedial measures pursuant to this legislation, including the prosecution of offences and the mediation of complaints.⁴ The sectors or relationships that fall within the scope of this legislation are specifically defined. There are no catchall provisions that provide protection for general consumer transactions or consumer agreements. There are not any provisions regarding mandatory arbitration clauses in consumer contracts.

3. *The Business Practices Act*⁵

*The Business Practices Act*⁶ prohibits a supplier from committing an unfair business practice and prescribes the types of representations or acts which are deemed to be an unfair business practice. The legislation sets out the duties and powers of a Director of Business Practices to administer this Act, including the investigation and mediation of unfair business

¹ As examples, see *The Consumer Protection Act*, C.C.S.M. c. C200, *The Business Practices Act*, C.C.S.M. c. B120, *The Personal Investigations Act*, C.C.S.M. c. P34, *The Charities Endorsement Act*, C.C.S.M. c. C60, *The Hearing Aid Act*, C.C.S.M. c. H38 and *The Bedding, Upholstered and Stuffed Articles Regulation*, Man.Reg. 78/2004.

² *The Consumer Protection Act*, *supra* note 1.

³ *Ibid.*

⁴ *Ibid.* ss. 70-74.

⁵ *The Business Practices Act*, *supra* note 1.

⁶ *Ibid.*

practices. *The Business Practices Act*⁷ prescribes the right of a consumer to commence a court action against a supplier for relief from unfair business practices, and sets out a wide range of remedies available by court order. This is broad based legislation that provides extensive protection to Manitoba consumers.

The *Business Practices Act*⁸ does not contain any provisions regarding mandatory arbitration clauses in consumer contracts, although one can envision an argument that a mandatory arbitration clause, particularly one that is "buried in the fine print" could be construed as an unfair business practice.

The relevant definitions and provisions provide as follows:

- 1 "consumer" means an individual who is or may become the consumer in a consumer transaction;
"consumer transaction" means a transaction between a consumer and a supplier for the retail sale or lease or other retail commercial disposition, by the supplier to the consumer, of any goods, in the ordinary course of business of the supplier and primarily for the consumer's personal, family or household use;
- 2(1) "goods" means goods or services that are or may become the subject of a consumer transaction;
- 2(1) "supplier" means a person who, as principal or agent, is carrying on or is engaged in the business of
 - (a) selling, leasing or otherwise disposing of goods on a retail basis, or
 - (b) manufacturing, producing or assembling goods, or
 - (c) distributing goods;
- 2(2) It is an unfair business practice for a supplier
 - (a) to do or say anything or to fail to do or say anything if, as a result, a consumer might reasonably be deceived or misled; or
 - (b) to make a false claim.
- 2(2) In determining whether anything is an unfair business practice within the meaning of subsection (1), the factors to be considered shall include the general impression given.⁹
- 3 It is an unfair business practice for a supplier to take advantage of a consumer if the supplier knows or can reasonably be expected to know that the consumer is not in a position to protect the consumer's own interests.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.* S. 2(3) of this Act provides a lengthy list of representations or acts which, when made by a supplier in relation to goods or consumer transactions, are deemed to be an unfair business practice, without limiting the generality of subsection 2(1). Examples include, a false representation as to the history or usage of goods; an exaggeration, innuendo, ambiguity regarding a material fact; a failure to disclose a material fact; a representation that the goods have characteristics, greater quantities, uses, price benefits or advantages, when that is not the case.

5 No supplier shall commit an unfair business practice.

23(1) A consumer may commence a court action against a supplier for relief from an unfair business practice.

23(2) Where the court finds in an action under subsection (1) that an unfair business practice has occurred, it may...,

- (a) award damages for any loss suffered by the consumer;
- (b) rescind the consumer transaction, if any;
- (c) grant an injunction restraining the supplier from continuing the unfair business practice;
- (d) order the supplier to repay all or part of any amount paid to the supplier by the consumer or relieve the consumer from the payment to the supplier of any amount or any further amount, as the case may be, in respect of the consumer transaction, if any;
- (e) make an order of specific performance against the supplier;
- (f) give such other directions and grant such other relief as the court deems proper.

B. OTHER CANADIAN JURISDICTIONS

1. Introduction

As noted earlier, Ontario and Quebec are the only Canadian jurisdictions that have legislative provisions invalidating or prohibiting mandatory arbitration clauses that preclude consumer class actions. Alberta has a limited form of consumer protection from arbitration agreements in the context of unfair trading practices. Beyond that, Canadian legislation is silent on the issue of mandatory arbitration clauses and consumer class actions.

2. Quebec

In Quebec, mandatory arbitration clauses in consumer contracts are expressly prohibited. The *Consumer Protection Act*¹⁰ was amended in 2006 by the insertion of section 11.1., which provides as follows:

Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.

If a dispute arises after a contract has been entered into, the consumer may then agree to refer the dispute to arbitration.

¹⁰ *Consumer Protection Act*, R.S.Q. c. P-40.1 [Consumer Protection Act].

3. Ontario

The Ontario *Consumer Protection Act*¹¹ invalidates pre-dispute arbitration clauses and specifically protects consumer class proceedings notwithstanding pre-dispute agreements to the contrary.¹² The relevant sections are as follows:

- 7(1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.
- (2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.
- (3) Despite subsections (1) and (2), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.
- (4) A settlement or decision that results from the procedure agreed to under subsection (3) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which the Act does not apply.
- (5) Subsection 7(1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.¹³

- 8(1) A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a

¹¹ *Consumer Protection Act*, 2002, S.O. 2002, c. 30 [*Consumer Protection Act*]. Ontario has a significantly more consolidated consumer protection regime than Manitoba. The Ontario consumer protection legislation is an omnibus statute that encompasses, *inter alia*, the protection provided in Manitoba by *The Consumer Protection Act, supra* note 1 and *The Business Practices Act, supra* note 1. According to a news release issued by the Ontario Government, the new Ontario consumer protection legislation (which came into force on June 30, 2005), “consolidates six existing consumer protection laws: *The Business Practices Act*, *The Consumer Protection Act*, *The Consumer Protection Bureau Act*, *The Loan Brokers Act*, *The Motor Vehicle Repair Act* and *The Prepaid Services Act*.” See Ontario Ministry of Government and Consumer Services, News Release, “Sweeping Legislation Creates New Rights for Consumers” (20 July 2005).

¹² *Consumer Protection Act, ibid.*, ss. 7 and 8. The timing of this legislative amendment is interesting. Following the decision in *Kanitz v Rogers Cable* (2002), 58 O.R. (3d) 299 (S.C.J.), where the court commented upon the absence of a legislative exemption for class proceedings from the effects of arbitration, these sections invalidating pre-dispute consumer arbitration clauses and prioritizing consumer class proceedings were enacted.

¹³ Subsection 7(1) of the *Arbitration Act, 1991*, S.O. 1991, c.17 is similar to subsection 7(1) of *The Arbitration Act, C.C.S.M. c. A120*, and requires a stay of proceeding if a party to an arbitration agreement commences a proceeding in respect of a dispute which is to be submitted to arbitration pursuant to an arbitration agreement.

consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.

(2) After a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.

Prior to the enactment of these provisions, based upon a review of the draft legislation, observations were made regarding the anticipated impact of sections 7 and 8 above.¹⁴ It was suggested that once these new provisions came into force, they should “operate to nullify mandatory arbitration clauses in all consumer contracts in Ontario” and that these provisions should ensure that consumers in Ontario would be “free to initiate actions and participate in class actions free from the bounds of arbitration”.¹⁵

4. Alberta

The *Fair Trading Act*¹⁶ does not address class proceedings, but provides limited consumer protection from mandatory arbitration clauses that have not been approved by the government. Section 16 provides as follows:

Despite any provision of this *Act*, neither a consumer nor the Director may commence or maintain an action or appeal under sections 13 to 15 if the consumer’s cause of action under those sections is based on a matter that the consumer has agreed in writing to submit to arbitration and the arbitration agreement governing the arbitration has been approved by the Minister.¹⁷

Section 16 of the *Fair Trading Act*¹⁸ was considered in the case of *Ayrton v PRL Financial (Alta.) Ltd.*¹⁹ In *Ayrton*, an action was commenced regarding the fees and interest rates charged in payday loan agreements. The subject agreements contained arbitration clauses

¹⁴ Susan Lott, Marie Hélène Beaulieu and Jannick Desforges, Public Interest Advocacy Centre and Options consommateurs, “Mandatory Arbitration and Consumer Contracts” (Ottawa, Canada, November 2004), at 49 online: <<http://www.piac.ca/consumer/mandatory>>.

¹⁵ *Ibid.*

¹⁶ *Fair Trading Act*, R.S.A. 2000, c. F-2.

¹⁷ *Ibid.* s.16. Sections 13 to 15 of this Act describe the various court actions available to a consumer in respect of damage or loss due to an unfair business practice, as well as actions which may be brought on behalf of a consumer when it is the public interest to do so.

¹⁸ *Ibid.*

¹⁹ *Ayrton v PRL Financial (Alta.) Ltd.*, 2004 ABQB 787, 369 A.R. 235. [*Ayrton*].

requiring that disputes be referred to arbitration. An application was filed for a stay of proceeding pursuant to section 7(1) of the *Arbitration Act*²⁰ (which prescribes a stay of proceeding if a party to an arbitration agreement commences a proceeding in respect of a matter that is the subject of an arbitration agreement). At issue was whether the *Fair Trading Act*²¹ or the *Arbitration Act*²² should prevail. The court dismissed the application for a stay of proceeding as the agreement to arbitrate was not approved by the Minister pursuant to section 16 of the *Fair Trading Act*,²³ and held that the arbitration clause accordingly could not bar the action. While it is significant that Alberta has enacted some consumer protection from mandatory arbitration, given the uniqueness of this provision any precedent value would likely be limited to Alberta.

C. INTERNATIONAL JURISDICTIONS

1. United States

(a) Legislation

As noted earlier, companies in the United States are increasingly utilizing arbitration clauses as a means to prohibit consumer class actions.²⁴ It has been suggested that the United States is similar to Canada to the extent that both jurisdictions encourage arbitration and class actions and have legislation which prescribes for stays of proceedings in the face of valid arbitration agreements.²⁵

The *Federal Arbitration Act*,²⁶ which was adopted in 1925, provides for the enforcement of arbitration agreements in commercial transactions.²⁷ Section 2 of the Act states as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

²⁰ *Arbitration Act*, R.S.A. 2000, c. A-43.

²¹ *Fair Trading Act*, *supra* note 16.

²² *Arbitration Act*, *supra* note 20.

²³ *Fair Trading Act*, *supra* note 16.

²⁴ Jean R. Sternlight and Elizabeth J. Jensen, "Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse?" (2004) 67 *Law & Contemp. Probs.* 75 at 75-76.

²⁵ Shelley McGill, "The Conflict Between Consumer Class Actions And Contractual Arbitration Clauses" (2006) 43 *Can. Bus. L.J.* 359 at 373.

²⁶ *Federal Arbitration Act*, 9 U.S.C. (2000) [*Federal Arbitration Act*].

²⁷ Jean Sternlight, "Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World" (2002) 56 *U. Miami L. Rev.* 831 at 832 [Sternlight, "The U.S. Approach"].

arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁸

Historically, the enforcement of pre-dispute arbitration agreements did not apply to transactions between businesses and consumers.²⁹ However, in the 1980s, a number of decisions from the United States Supreme Court supported the enforcement of arbitration clauses between businesses and consumers (and employers).³⁰ While section 2 of the *Federal Arbitration Act* provides for revocation on legal or equitable grounds, it has been noted that the courts have generally held that arbitration agreements are unenforceable only in cases of “the most egregious and obviously unfair arbitration clauses due to unconscionability or similar reasons”.³¹ To that end, it has been suggested that a review of American case law demonstrates that most federal courts have held that “class action rights are procedural only and waiving them is not unconscionable or against public policy”.³² Further, it has been suggested that courts have not been prepared to void arbitration agreements simply because they were unsigned, contained in the small print or “buried in the middle of a long agreement”.³³

An exception to this pro-arbitration perspective can be seen in California, where courts have generally not been prepared to enforce consumer class action waivers, and have indicated that such waivers are unconscionable as they defeat the goals of class actions.³⁴

There is not any federal legislation prohibiting mandatory consumer arbitration.³⁵ However, a recent bill was introduced in the House of Representatives and Senate which

²⁸ *FAA*, *supra* note 26, s. 2.

²⁹ Sternlight, “The U.S. Approach”, *supra* note 27 at 832.

³⁰ *Ibid.* at 833.

³¹ *Ibid.* at 836.

³² McGill, *supra* note 25 at 375.

³³ Sternlight, “The U.S. Approach”, *supra* note 27 at 837.

³⁴ McGill, *supra* note 25 at 374.

³⁵ Sternlight, “The U.S. Approach”, *supra* note 27 at 840-842.

would amend the *Federal Arbitration Act* to preclude the use of pre-dispute arbitration agreements in employment, consumer or franchise disputes.³⁶

Currently, the enforcement of consumer arbitration clauses in the face of proposed class proceedings is determined by the courts on a case by case basis,³⁷ and the majority of courts in the United States enforce mandatory consumer arbitration clauses.³⁸

(b) Class Arbitration

Class arbitration developed in the United States as a combination of arbitration and class proceedings.³⁹ It has been suggested that class arbitration supports the policy goals of class proceedings (such as economic access to justice through the pooling of resources) and still preserves the choice of arbitration.⁴⁰ The following suggestion has been made as to why class arbitration should be adopted in Canada:

In Canada, there is no principled reason why an arbitration clause should not be enforced and the arbitrator given the power to determine whether or not an arbitration may proceed as a class arbitration, even in those cases in which a consumer contract is involved. There may well be cases in which plaintiff's counsel would prefer a class action arbitration. The reality of e-commerce and the Internet brings into question the ability of counsel to craft a truly representative class in any local court. In e-commerce matters, such as the Dell case, the potential class crosses all jurisdictions and countries. The only mechanism available for a truly international class action is by way of arbitration in which each class member has signed an arbitration agreement and has agreed to arbitrate their disputes regardless of their residence.⁴¹

³⁶ Jean R. Sternlight, "In Defense of Mandatory Binding Arbitration (If Imposed On The Company)" (2007) 8 Nevada L.J. 101 at 103. At footnote 12, Professor Sternlight notes that this bill, entitled *Arbitration Fairness Act of 2007*, S.1782, 110th Cong.(2007); H.R. 3010, 110 Cong.(2007) contains a provision stating: "No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of ...an employment, consumer or franchise dispute..." .

³⁷ Sternlight, "The U.S. Approach", *supra* note 27 at 833-837.

³⁸ *Ibid.* at 843.

³⁹ McGill, *supra* note 25 at 376-377. In this article, Professor McGill indicates that there are inconsistent decisions regarding the availability and enforcement of class arbitration. For example, class arbitration has been recognized by the American Arbitration Association and various court rulings, but some federal and state courts have held that class arbitration is not included within the general choice of arbitration. There is much conflict as to whether arbitration includes class arbitration when it is not specifically waived or authorized.

⁴⁰ *Ibid.* at 376-377.

⁴¹ J. Brian Casey, "Commentary: class action arbitration should be available", *The Lawyers Weekly*, 25:44 (31 March 2006).

There is a great deal of uncertainty regarding the effectiveness and enforcement of class arbitration in the United States. For example, arbitration benefits such as privacy, speed and procedural simplification are lost through class-wide arbitration.⁴² There is also a concern that class arbitration may fail to identify “jurisdictional, administrative expense and procedural problems”.⁴³ Most significantly, there are increasing numbers of arbitration clauses that purport to bar class proceedings as well as class arbitration, leaving consumers with individual arbitration as their only means of dispute resolution.⁴⁴ There are varying court rulings as to whether mandatory arbitration clauses that prohibit class arbitrations are valid or unconscionable and whether class wide arbitration waivers contravene the *Federal Arbitration Act* provisions in favor of arbitration.⁴⁵

Ultimately, class arbitration clauses do not address the underlying difficulty with court proceedings being precluded to consumers. There may be situations where class-wide arbitrations are a reasonable dispute resolution mechanism, provided that they are agreed to voluntarily, with the full consent and participation of consumers. The concerns expressed earlier regarding mandatory arbitration clauses in consumer contracts are applicable to mandatory class arbitration clauses in consumer contracts. Canadian jurisprudence does not address class wide arbitration and given all the uncertainty in the United States, the Commission does not feel that the adoption of class wide arbitration legislation in Manitoba would be a prudent solution.⁴⁶

2. The European Union

Consumer protection from mandatory arbitration has been addressed by the European Union. A directive was issued by the Council of the European Communities which provides that it is the responsibility of member states to ensure that consumer contracts do not contain unfair

⁴² McGill, *supra* note 25 at 377.

⁴³ *Ibid.*

⁴⁴ *Ibid* at 363-364, 378.

⁴⁵ *Ibid.* at 364, 378. In the case of *Green Tree Financial Corp. v Bazzle*, 539 U.S. 444 (2003), the United States Supreme Court held that an arbitrator should determine whether class arbitration is permissible under an arbitration agreement. Further, where an arbitration agreement is silent regarding the availability of class arbitration, an arbitrator should make that determination rather than a court.

⁴⁶ Canadian case law has not dealt directly with class arbitration. In *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 203 B.C.A.C. 103, at para. 8, the court noted in the factual context of the case that the plaintiff proposed class arbitration but that National Money Mart refused. The court did not however consider the application or merits of class-wide arbitration. Further, in McGill, *supra* note 25 at 379, it was mentioned that a few Canadian courts have discussed consolidation. For example, in *Kanitz v. Rogers Cable* (2002), 58 O.R. (3d) 299 (S.C.J.) at paras. 54-55, the court indicated that arguably, under the general authority to determine the procedure of an arbitration, an arbitrator could consolidate arbitrations if all the representative plaintiffs chose to seek arbitration. No further findings or comments were made in this regard.

terms, and mandatory arbitration is contained in an annex of terms that may be regarded as unfair.⁴⁷ The relevant provisions provide as follows:

Article 3:

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

ANNEX:

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.⁴⁸

Subsequently, the Commission of the European Communities issued a recommendation regarding out-of-court alternatives which provides as follows:

Whereas in accordance with Article 6 of the European Human Rights Convention, access to the courts is a fundamental right that knows no exceptions;...whereas, out-of-court procedures cannot be designed to replace court procedures; whereas, therefore, use of the out-of-court alternative may not deprive consumers of their right to bring the matter before the courts unless they expressly agree to do so, in full awareness of the facts and only after the dispute has materialised;⁴⁹

⁴⁷ EC, *Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts*, [1993] O.J. L 95/29, Article 3 [European Union Directive]. Also see Sternlight, "The U.S. Approach", *supra* note 27 at 844-846.

⁴⁸ European Union Directive, *ibid.*, annex 1(q).

⁴⁹ EC, *Commission Recommendation 1998/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes*, [1998] O.J. L 115/31 at 33. Also see Sternlight, "The U.S. Approach", *supra* note 27 at 845-846.

Based upon the European Union Directive, some European countries have enacted legislation prohibiting pre-dispute mandatory arbitration clauses in consumer agreements.⁵⁰ For example, it has been noted that in the United Kingdom there is legislation which deems pre-dispute consumer arbitration clauses to be ineffective where the claim is less than 5000 pounds.⁵¹ In claims for amounts over 5000 pounds, the courts must determine whether pre-dispute arbitration clauses are unfair pursuant to *The Unfair Terms in Consumer Contracts Regulations 1999*,⁵² on a case by case basis.⁵³

It has been suggested that not much controversy exists respecting the use of consumer mandatory arbitration clauses in the European Union likely because it is presumed to be prohibited.⁵⁴ While the position in the European Union against mandatory arbitration is interesting to note, the legislative context is different from Canada and the United States in that the European Union does not have class proceedings legislation.⁵⁵

3. New Zealand

New Zealand has legislation prohibiting mandatory arbitration in consumer contracts, subject to a consumer waiving that protection.⁵⁶ Pursuant to the *Arbitration Act*,⁵⁷ a mandatory arbitration agreement is not enforceable against a consumer unless there is a written agreement to be bound by that contract. Section 11(1) provides as follows:

11 Consumer arbitration agreements:

(1) Where—

- (a) A contract contains an arbitration agreement; and
- (b) A person enters into that contract as a consumer,—
the arbitration agreement is enforceable against the consumer only if—
- (c) The consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it; and

⁵⁰ Sternlight, "The U.S. Approach", *supra* note 27 at 847.

⁵¹ *Ibid.* Also see *Arbitration Act* 1996 (U.K.) c.23, s. 91.

⁵² *The Unfair Terms in Consumer Contracts Regulation* [S.I. 1999/2083]. Section 5 of this statutory instrument incorporates the definition of "unfair terms" from the European Union Directive.

⁵³ Lott, Beaulieu and Desforges, *supra* note 14 at 42-43. Also see *Arbitration Act* 1996 (U.K.) c.23, s. 89.

⁵⁴ Sternlight, "The U.S. Approach", *supra* note 27 at 848.

⁵⁵ Lott, Beaulieu and Desforges, *supra* note 14 at 43.

⁵⁶ *Ibid.* at 44.

⁵⁷ *Arbitration Act* 1996 (N.Z.), 1996/99, s. 11(1).

- (d) The separate written agreement referred to in paragraph (c) discloses, if it is the case, the fact that all or any of the provisions of Schedule 2 do not apply to the arbitration agreement.

It has been suggested that a written waiver may not provide adequate protection as some consumers may not appreciate the consequences of a pre-dispute arbitration agreement.⁵⁸

4. Australia

Australia does not have legislation that generally prohibits mandatory arbitration clauses in consumer agreements, although there are some individual statutes that contemplate arbitration clauses being voided in limited circumstances.⁵⁹

It has been suggested that there is little litigation regarding mandatory arbitration in Australia likely because consumer complaints are received and investigated administratively, rather than by recourse to court action.⁶⁰ Further, there is widespread use of alternative dispute resolution for consumer disputes, often encouraged by the government, and this seemingly has mitigated the practice of businesses inserting mandatory arbitration clauses in consumer contracts.⁶¹

⁵⁸ Lott, Beaulieu and Desforges, *supra* note 14 at 44.

⁵⁹ *Ibid* at 44, where examples include the *Australia Insurance Contracts Act 1984* (Cth.), s. 43, which provides that arbitration clauses will be void in insurance benefits contracts, and the federal *Trade Practices Act 1974* (Cth.), ss. 44Y, 51AB, 51AC which contains "provisions, which may be used to circumvent or nullify the effects of arbitration clauses."

⁶⁰ Lott, Beaulieu and Desforges, *supra* note 14 at 45-46, and Sternlight, "The U.S. Approach", *supra* note 27 at 852.

⁶¹ *Ibid*.

CHAPTER 7

PROPOSED REFORMS

The Commission fully supports domestic arbitration in matters of commerce, and reiterates the comments and recommendations made in its *Arbitration Report #85*, 1994. However, some of the attributes and benefits of arbitration, such as accessibility and cost effectiveness, may not realistically be attainable when mandatory arbitration is unilaterally imposed upon consumers and when consumers are prevented from accessing their choice of forum.

The Commission feels that consumers should have full access to court proceedings, including class actions and small claims court proceedings. This approach would still enable consumers to choose arbitration as a method of dispute resolution when such a choice is made voluntarily.

At this point in Manitoba, should there be a conflict between mandatory arbitration and class proceedings, determinations would be made on a case-by-case basis by courts or arbitrators, and in the Commission's view, the current statutory regime would benefit from some clarity. As discussed earlier, the relevant legislation entails: (1) arbitration legislation which prescribes a stay of proceeding, subject to a few exceptions, and does not refer to mandatory arbitration or class proceedings, (2) class proceedings legislation which encourages class proceedings and does not address arbitration and (3) business practices and consumer protection legislation which cover a wide range of consumer practices entitled to protection, but are silent respecting mandatory arbitration in consumer contracts.

The Commission is concerned that as a result of the recent Supreme Court of Canada decisions in *Dell Computer Corp. v Union des consommateurs*¹ and *Rogers Wireless Inc. v Muroff*,² mandatory arbitration clauses may jeopardize consumer class proceedings in Manitoba. Moreover, the Commission is concerned that consumers in Manitoba will be placed in a disadvantaged position as compared with jurisdictions that have more expansive consumer protection legislation, such as Ontario and Quebec. The Commission takes the position that reform to Manitoba consumer protection legislation would provide needed clarity to this flux and is the most appropriate approach to protect Manitoba consumers more effectively.

The following comments have been made in support of legislative reform:

The Supreme Court decisions likely will engender much new and expensive litigation involving the validity of arbitration provisions outside Ontario and

¹ *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801.

² *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, 284 D.L.R. (4th) 675.

Quebec, until such time as those provinces make clear their own positions.³

Specific provincial variation will yield a patchwork of consumer protection schemes across the country but given the uncertainty after *Dell*, provincial legislation is the best available solution. Without it, business will use choice of law and forum clauses to target those provinces without legislation and consumers will be left in the inconsistent world of unconscionability, where judges and arbitrators individually assess each consumer's claims of unfairness.⁴

Resort to a legislated rule, uniform across Canada, is the best response to the strategic use of pre-dispute arbitration clauses in consumer standard form contracts. Based on the type of consumer arbitration abuses seen to date in Canada and the American experience, domestic arbitration legislation should be amended in order to ensure that consumers retain access to small claims courts and class proceedings and have the ability to enforce the mandatory legal rights of their province of residence.⁵

While the Commission's recommendations for possible law reform are restricted to Manitoba, the desirability of national uniformity is appreciated.

The Commission is of the view that Manitoba legislation should be amended to prevent mandatory arbitration clauses in consumer agreements from precluding court actions, and that any amendment should expressly protect consumers' rights to commence or become members of class proceedings, despite any consumer agreement to the contrary.

The Commission is of the further view that sections 7 and 8 of the Ontario *Consumer Protection Act*⁶ should form the model for legislative amendments in Manitoba. This is the most thorough Canadian statutory model available and would address the concerns cited by the Commission.

RECOMMENDATION 1

Manitoba legislation should expressly provide that mandatory arbitration clauses in consumer agreements that purport to bar consumers from commencing court actions are invalid or prohibited.

³ Jacob Ziegel, "Canada's Top Court Has Sold Out Consumers By Handing Businesses An Easy Way To Avoid Class Action Suits", *Financial Post* (9 August 2007), online: <<http://www.financialpost.com/story.html?id=81511a9c-8c02-4f3b-a0c2-0651b10e3d96>>.

⁴ Shelley McGill, "Consumer Arbitration and Class Actions: The Impact of *Dell Computer Corp. v Union Des Consommateurs*" (2007) 45 Can. Bus. L.J. 334 at 354.

⁵ Jonnette Watson Hamilton, "Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006) 51 McGill L.J. 693 at para. 92.

⁶ *Consumer Protection Act*, 2002, S.O. 2002, c. 30.

RECOMMENDATION 2

Manitoba legislation should expressly provide that consumers may commence class proceedings or become members of consumer class proceedings despite any arbitration clause or arbitration agreement to the contrary.

RECOMMENDATION 3

Any legislative amendments implementing the Commission's recommendations should be based upon sections 7 and 8 of the Ontario Consumer Protection Act.⁷

There are a few possibilities as to which statute should embody these proposed legislative amendments. The issues and recommendations described in this report involve arbitration, class proceedings, consumer protection and unfair business practices, all of which have their own statutory regimes.

The Commission does not recommend that the proposed legislative amendments be implemented in *The Arbitration Act*,⁸ primarily by virtue of the wide array of sectors and relationships, beyond consumers, that can be impacted by *The Arbitration Act*.⁹ For example, there are numerous Manitoba statutes that contain provisions dealing with arbitration, some of which provide that certain matters are to be determined in accordance with the provisions of *The Arbitration Act*,¹⁰ or that a party may request arbitration¹¹ or that arbitration is to be dealt with pursuant to collective agreements.¹²

⁷ *Ibid.* ss. 7-8.

⁸ *Arbitration Act*, C.C.S.M. c. A120.

⁹ *Ibid.*

¹⁰ See *The Condominium Act*, C.C.S.M. c. C170, s. 16(4), *The Corporations Act*, C.C.S.M. c. C225, s. 314, *The Water Rights Act*, C.C.S.M. c. W65, s. 14(4), *The Highway Protection Act*, C.C.S.M. c. H50, s. 7(4) and *The Water Protection Act*, C.C.S.M. c. W65, s. 13(4).

¹¹ See *The Condominium Act*, *ibid.*, *The Pay Equity Act*, C.C.S.M. c. P13, s. 10(1), *The Planning Act*, C.C.S.M. c. P80, s. 88(3), *The Public Works Act*, C.C.S.M. c. P300, s. 13(1), *The Regional Health Authorities Act*, C.C.S.M. c. R34, s. 29.3(2), and *The Water Resources Administration Act*, C.C.S.M. c. W70, s. 23(1).

¹² See *The Labour Relations Act*, C.C.S.M. c. L10 and *The Public Schools Act*, C.C.S.M. c. P250.

The Commission does not recommend that the proposed legislative amendments be implemented in *The Class Proceeding Act*¹³ which may also impact other legislatively regulated sectors, examples of which include securities class actions and franchisee class actions.¹⁴

Although, *The Consumer Protection Act*¹⁵ and *The Business Practices Act*¹⁶ have different scopes and parameters, they both deal with issues of consumer protection. While implementation of the proposed amendments could logically be made to either of these statutes, the Commission suggests that the proposed legislative amendments should be enacted concurrently to *The Consumer Protection Act*¹⁷ and *The Business Practices Act*.¹⁸ The cumulative effect of both of these statutes provides greater protection for consumers. Concurrent legislative amendments should ensure that consumers in Manitoba are provided with comprehensive protection from mandatory arbitration clauses, provided that the subject consumer transaction or matter falls within the scope of *The Consumer Protection Act*¹⁹ or *The Business Practices Act*.²⁰ This should ensure that consumers in Manitoba may commence or participate in consumer class proceedings despite a mandatory arbitration clause to the contrary.

RECOMMENDATION 4

The legislative amendments that are recommended in this report should be implemented concurrently to The Business Practices Act and The Consumer Protection Act.

¹³ *The Class Proceedings Act*, C.C.S.M. c. C130.

¹⁴ Although Manitoba does not currently have franchise legislation, as noted earlier, the Commission is currently in the process of finalizing a report on franchise law, wherein it will recommend that Manitoba enact a Franchise Act, and *inter alia*, that the legislation contain a provision protecting a franchisee's right to commence a class action.

¹⁵ *The Consumer Protection Act*, C.C.S.M. c. C200.

¹⁶ *The Business Practices Act*, C.C.S.M. c. B120.

¹⁷ *The Consumer Protection Act*, *supra* note 15.

¹⁸ *The Business Practices Act*, *supra* note 16.

¹⁹ *The Consumer Protection Act*, *supra* note 15.

²⁰ *The Business Practices Act*, *supra* note 16.

CHAPTER 8

LIST OF RECOMMENDATIONS

1. Manitoba legislation should expressly provide that mandatory arbitration clauses in consumer agreements that purport to bar consumers from commencing court actions are invalid or prohibited. (p.37)
2. Manitoba legislation should expressly provide that consumers may commence class proceedings or become members of consumer class proceedings despite any arbitration clause or arbitration agreement to the contrary. (p.38)
3. Any legislative amendments implementing the Commission's recommendations should be based upon sections 7 and 8 of the *Ontario Consumer Protection Act*. (p.38)
4. The legislative amendments that are recommended in this report should be implemented concurrently to *The Business Practices Act* and *The Consumer Protection Act*. (p.39)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 1st day of April 2008.

“Original Signed by”
Cameron Harvey, President

“Original Signed by”
John C. Irvine, Commissioner

“Original Signed by”
Gerald O. Jewers, Commissioner

“Original Signed by”
Alice R. Krueger, Commissioner

“Original Signed by”
Perry W. Schulman, Commissioner

MANDATORY ARBITRATION CLAUSES AND CONSUMER CLASS PROCEEDINGS

EXECUTIVE SUMMARY

A. INTRODUCTION

This report examines mandatory arbitration clauses in consumer contracts that purport to bar consumers from commencing court actions, including class proceedings. When mandatory arbitration clauses are imposed upon consumers, tension arises among class proceedings, arbitration and choice of forum for dispute resolution. This report reviews the impact and judicial consideration of mandatory arbitration clauses in Canada, and examines whether two recent decisions from the Supreme Court of Canada have provided clarity or resolution to this issue. This report further reviews the statutory regime in Manitoba regarding class proceedings, arbitration and consumer protection, and compares it with regimes in other jurisdictions in order to assess whether legislative reform is necessary to ensure that consumers in Manitoba are provided with adequate protection.

B. MANDATORY ARBITRATION CLAUSES IN CANADA

Mandatory arbitration clauses often appear as pre-dispute provisions in standard form contracts and generally are not negotiable by consumers. Consumers may not be aware of the arbitration process and may be reluctant to initiate arbitration given the uncertain costs associated with this process.

Mandatory arbitration clauses deny consumers access to class proceedings, and class proceedings can be the most viable prospect for consumers to obtain remedies. Moreover, class proceedings enable the pooling of resources, which is particularly significant when the individual monetary amount in dispute is modest, they allow consumers to obtain information through the court discovery process and they facilitate a public challenge of consumer concerns, which can have a wide impact upon consumers generally.

The Commission is concerned that the disadvantages of mandatory arbitration clauses upon consumers can be severe, and that they may ultimately deny consumers from obtaining any remedy at all.

C. JUDICIAL CONSIDERATION OF MANDATORY ARBITRATION CLAUSES AND CONSUMER CLASS PROCEEDINGS IN CANADA

This report reviews two recent decisions from the Supreme Court of Canada in *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 35 and *Rogers Wireless Inc. v Muroff*, 2007 SCC 35 (hereinafter referred to as *Dell* and *Rogers*), where the validity and enforceability of mandatory arbitration clauses in consumer agreements arising from Quebec consumer disputes were upheld. Some commentators have suggested that the impact of these cases could

be limited to Quebec, and other commentators have suggested that these cases have jeopardized consumer class proceedings in Canadian jurisdictions, at least in those jurisdictions which lack statutory provisions prohibiting mandatory arbitration in consumer agreements. To date, the concern that *Dell* and *Rogers* will endanger consumer class proceedings has already come to fruition in the decision of *Frey v Bell Mobility Inc.* [2008] S.J. No. 105 (Q.B.) (QL).

D. CLASS PROCEEDINGS IN MANITOBA

In Manitoba, *The Class Proceedings Act* governs the certification and conduct of class proceedings. The statutory scheme is broad and is designed to facilitate class proceedings. The Commission examines the public policy goals and benefits of class proceedings, with particular regard to consumer class proceedings.

E. ARBITRATION IN MANITOBA

In Manitoba, *The Arbitration Act* governs the conduct of arbitrations. The statutory scheme is designed to limit judicial intervention and generally encourages stays of proceedings in the face of valid arbitration agreements. The Commission makes the distinction between arbitration as a voluntary dispute resolution mechanism and consumers being bound by mandatory arbitration pursuant to contractual provision.

The Commission examines the public policy goals and benefits of arbitration and gives consideration to primacy issues respecting mandatory arbitration and class proceedings.

F. CONSUMER PROTECTION LEGISLATION

In Manitoba, *The Consumer Protection Act* and *The Business Practices Act* provide extensive consumer protection, as well as investigative and remedial actions. Neither of these statutes contains provisions pertaining to mandatory arbitration clauses in consumer contracts.

In this report, the Commission reviews consumer protection schemes with respect to mandatory arbitration and consumer class proceedings in other Canadian jurisdictions. In recent years, legislative reform has taken place to consumer protection legislation in Ontario and Quebec, whereby specific statutory provisions invalidate or prohibit mandatory arbitration clauses that preclude consumer class actions. Alberta has a limited form of consumer protection from mandatory arbitration in the context of unfair trading practices.

The Commission also provides examples of consumer protection regimes from international jurisdictions. In the United States, there is not any federal legislation prohibiting mandatory arbitration clauses in consumer contracts. The enforceability of mandatory arbitration clauses in the face of proposed class proceedings is determined by the courts on a case by case basis. In the European Union, a directive was issued by the European Communities that indicates it is the responsibility of member states to ensure that consumer contracts do not contain unfair

terms, and mandatory arbitration is specified as a terms which may be regarded as unfair. In New Zealand, the *Arbitration Act 1996* states that an arbitration clause in a consumer agreement is not enforceable unless a consumer agrees, in writing, to be bound by the arbitration agreement. In Australia, there is not any legislation prohibiting mandatory arbitration clauses. However, given the widespread use of alternative dispute resolution in Australia, mandatory arbitration is not particularly popular.

G. PROPOSED REFORMS

The threshold issues considered by the Commission are whether the recent Supreme Court of Canada cases of *Dell* and *Rogers* have jeopardized consumer class proceedings in Manitoba and whether legislative reform is appropriate in order to provide clarity, consistency and better protection for Manitoba consumers from mandatory arbitration clauses.

The Commission takes the position that legislative intervention is necessary to ensure that Manitoba consumers retain access to their choice of court proceedings, including class proceedings.

The Commission recommends that concurrent statutory amendments should be enacted to *The Consumer Protection Act* and *The Business Practices Act*, which stipulate that a mandatory arbitration clause in a consumer agreement is invalid or prohibited. The Commission further recommends that statutory amendments should be enacted which stipulate that a consumer may commence or become a member of a class proceeding despite any consumer clause or agreement to the contrary.

Finally, the Commission recommends that recent statutory reforms to the Ontario *Consumer Protection Act* regarding the invalidation of mandatory arbitration in consumer agreements form the model for similar reforms to consumer protection legislation in Manitoba.

LES CLAUSES D'ARBITRAGE OBLIGATOIRE ET LES RECOURS COLLECTIFS DE CONSOMMATEURS

RÉSUMÉ

A. INTRODUCTION

Le présent rapport vise la question des clauses d'arbitrage obligatoire dans les contrats de consommation qui ont pour objet d'empêcher les consommateurs d'intenter des poursuites en justice, notamment des recours collectifs. Lorsque des clauses d'arbitrage obligatoire sont imposées aux consommateurs, une certaine tension s'instaure entre le recours collectif, l'arbitrage et le choix du tribunal pour le règlement des litiges. Le présent rapport analyse l'incidence et l'appréciation judiciaire des clauses d'arbitrage obligatoire au Canada, et tente de déterminer si deux arrêts récents de la Cour suprême du Canada ont permis d'éclaircir et de résoudre la question. Le régime législatif manitobain en matière de recours collectifs, d'arbitrage et de protection du consommateur est présenté et comparé ensuite aux régimes en vigueur dans d'autres provinces et territoires, en vue d'établir si une réforme législative est nécessaire pour que les consommateurs du Manitoba soient bien protégés.

B. LES CLAUSES D'ARBITRAGE OBLIGATOIRE AU CANADA

Les clauses d'arbitrage obligatoire semblent souvent constituer des clauses annonciatrices de différends dans les contrats types et elles ne sont généralement pas négociables pour les consommateurs. Il se peut que les consommateurs ne soient pas informés sur le processus d'arbitrage et qu'ils soient réticents à entamer des procédures d'arbitrage étant donné les coûts incertains qui caractérisent ce processus.

Les clauses d'arbitrage obligatoire privent les consommateurs de l'accès aux recours collectifs, alors que ces recours collectifs sont peut-être pour eux l'option la plus viable afin d'obtenir réparation. De plus, les recours collectifs permettent la mise en commun de ressources, ce qui revêt une importance particulière lorsque le montant en litige est modeste; ils donnent l'occasion aux consommateurs d'être mieux informés sur les tribunaux par le biais du processus de communication préalable et ils facilitent la contestation publique d'éléments préoccupants pour le consommateur, ce qui peut avoir une grande incidence sur les consommateurs en général.

La Commission craint que les inconvénients causés aux consommateurs par les clauses d'arbitrage obligatoire ne soient graves et ne finissent par priver les consommateurs de tout recours.

C. L'INTERPRÉTATION JUDICIAIRE DES CLAUSES D'ARBITRAGE OBLIGATOIRE ET DES RECOURS COLLECTIFS DE CONSOMMATEURS AU CANADA

Le présent rapport examine les deux arrêts récents, rendus par la Cour suprême du Canada dans les affaires *Dell Computer Corp. c. Union des consommateurs*, 2007 CSC 34 et *Rogers Sans-fil inc. c. Muroff*, 2007 CSC 35 (ci-après appelés *Dell* et *Rogers*), dans lesquels la validité et l'exécution des clauses d'arbitrage obligatoire contenues dans les contrats de consommation, qui découlent de litiges de consommateurs au Québec, ont été maintenues. Certains auteurs ont pu dire que l'incidence de ces arrêts pourrait se limiter au Québec, tandis que, selon d'autres, ils ont compromis les recours collectifs de consommateurs dans les ressorts canadiens, du moins dans ceux qui sont dépourvus de dispositions législatives interdisant les clauses d'arbitrage obligatoire dans les contrats de consommation. Jusqu'à présent, la crainte de voir les arrêts *Dell* et *Rogers* mettre en péril les recours collectifs de consommateurs a déjà trouvé application dans l'affaire *Frey c. Bell Mobility Inc.* [2008] S.J. No. 105 (Q.B.) (QL).

D. LES RECOURS COLLECTIFS AU MANITOBA

Au Manitoba, la *Loi sur les recours collectifs* régit l'attestation et le déroulement du recours collectif. Le système législatif est large et conçu pour faciliter les recours collectifs. La Commission examine les objectifs et les avantages d'intérêt public des recours collectifs, en particulier les recours collectifs de consommateurs.

E. L'ARBITRAGE AU MANITOBA

Au Manitoba, la *Loi sur l'arbitrage* régit la conduite de l'arbitrage. Le système législatif est conçu pour limiter l'intervention judiciaire et il encourage généralement l'arrêt des procédures dans un contexte de conventions d'arbitrage valides. La Commission fait la distinction entre l'arbitrage en tant que mécanisme de règlement volontaire des différends et le cas des consommateurs qui sont tenus de recourir à un arbitrage obligatoire en vertu d'une stipulation contractuelle.

La Commission examine les objectifs et les avantages d'intérêt public de l'arbitrage et elle tient compte des enjeux prépondérants en ce qui concerne l'arbitrage obligatoire et les recours collectifs.

F. LES LOIS SUR LA PROTECTION DU CONSOMMATEUR

Au Manitoba, la *Loi sur la protection du consommateur* et la *Loi sur les pratiques commerciales* prévoient une protection du consommateur étendue, ainsi que des mesures d'enquête et de correction. Aucune de ces lois ne comprend des dispositions sur les clauses d'arbitrage obligatoire dans des contrats de consommation.

Dans le présent rapport, la Commission examine les régimes de protection du consommateur en matière d'arbitrage obligatoire et de recours collectifs de consommateurs dans les autres provinces et territoires canadiens. Au cours des dernières années, des changements ont été apportés aux lois sur la protection du consommateur en Ontario et au Québec; ils prévoient des dispositions législatives particulières qui invalident ou interdisent les clauses d'arbitrage obligatoire dont l'effet est de priver les consommateurs de recours collectifs. L'Alberta est dotée d'une forme limitée de protection du consommateur en ce qui concerne l'arbitrage obligatoire dans un contexte de pratiques commerciales inéquitables.

La Commission fournit aussi des exemples pris à l'étranger de régimes de protection du consommateur. Aux États-Unis, aucune mesure législative fédérale n'interdit les clauses d'arbitrage obligatoire dans les contrats de consommation. L'opposabilité des clauses d'arbitrage obligatoire dans le contexte de recours collectifs proposés est établie par les tribunaux de manière ponctuelle. Dans les pays de l'Union européenne, une directive émise par les Communautés européennes indique qu'il incombe aux États membres de s'assurer que les contrats de consommation ne contiennent pas de conditions injustes, et l'arbitrage obligatoire y figure précisément comme une condition pouvant être jugée injuste. En Nouvelle-Zélande, aux termes de l'*Arbitrage Act 1996*, une clause d'arbitrage dans un contrat de consommation n'est pas opposable à moins que le consommateur ne consente, par écrit, à être lié par la convention d'arbitrage. Pour ce qui est de l'Australie, il n'y existe aucune loi interdisant les clauses d'arbitrage obligatoire. Toutefois, compte tenu du recours généralisé au règlement extrajudiciaire des différends en Australie, l'arbitrage obligatoire n'y est pas particulièrement populaire.

G. RÉFORMES PROPOSÉES

Les questions préliminaires étudiées par la Commission consistent à savoir si les récents arrêts *Dell* et *Rogers* de la Cour suprême du Canada ont mis en péril les recours collectifs de consommateurs au Manitoba et s'il convient de faire une réforme législative pour apporter de la clarté et de la cohérence, ainsi qu'une meilleure protection, aux consommateurs du Manitoba à l'égard des clauses d'arbitrage obligatoire.

Le point de vue de la Commission est qu'une intervention législative est nécessaire afin d'assurer que les consommateurs du Manitoba conservent leur choix d'actions en justice, y compris les recours collectifs.

La Commission recommande que soient adoptées en même temps des modifications législatives à la *Loi sur la protection du consommateur* et à la *Loi sur les pratiques commerciales* en vue de rendre invalides ou d'interdire les clauses d'arbitrage obligatoire dans les contrats de consommation. De plus, la Commission recommande que des modifications législatives soient adoptées afin que le consommateur puisse intenter un recours collectif, ou puisse y participer, malgré toute clause ou entente contraire qu'il aurait acceptée.

Enfin, la Commission recommande que les récentes réformes législatives à la *Loi de 2002 sur la protection du consommateur* (Ontario) en ce qui concerne l'invalidité des clauses d'arbitrage obligatoire dans les contrats de consommation, servent de modèle pour des réformes similaires dans la législation sur la protection du consommateur au Manitoba.

